

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE
(PPA) PRODUCTS LIABILITY
LITIGATION,

MDL NO. 1407

ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY JUDG-
MENT

This document relates to:
Miller v. United Research Lab-
oratories, Inc., C04-86

This matter comes before the court on a motion for summary judgment filed by defendants Carnrick Laboratories, Inc. and Elan Pharmaceuticals, Inc. ("defendants"). Having considered the briefs filed in support of and opposition to this motion, the court finds and rules as follows.

I. BACKGROUND

Plaintiff Darwin Miller alleges that on January 20, 2001, his wife Rondalynn Laird-Miller suffered a hemorrhagic stroke as a result of having ingested PPA-containing products, including the cough and cold medication Propagest. She died several days after being admitted to the hospital. Defendants Carnrick and Elan were named as manufacturers of the drug Propagest.

Plaintiff filed suit in Montana federal court; this matter was subsequently transferred to this MDL. Defendants now move for

1 summary judgment based on this court's *Daubert* ruling, in which
2 the court established that evidence of ingestion within 72 hours
3 of stroke is an essential element of a plaintiff's claim. See
4 June 18, 2003 Order Granting in Part and Denying in Part MDL
5 Defendants' Motion to Preclude Plaintiffs' Expert Opinions as to
6 General Causation.

7 Defendants submit that plaintiff's witness affidavits and
8 testimony establish, at most, a "possibility" that Laird-Miller
9 took Propagest in the three days preceding her stroke. For
10 example, the evidence shows that Laird-Miller suffered from
11 allergies and often had difficulty breathing, and that she had a
12 routine of taking pills she thought would help her. See Darwin
13 Miller Dep., Exh. 12 to Winchester Decl., pp. 108-09. Specifi-
14 cally, Miller testified that his wife's "routine was opening -
15 taking, you know, throughout the day, various times she would
16 take whatever pill she decided that she needed at the moment to
17 help her breathe. And I am just assuming, because of this routine
18 that she had, that she did that day." *Id.* In particular, after
19 Laird-Miller's death, Propagest, Robitussin CF and a generic
20 prescription medication containing PPA were all found in her
21 medicine cabinet. *Id.*, p. 246. The 100-count bottle of Propagest,
22 which was one of two bottles her daughter mailed to her in the
23 summer of 1999 or 2000, was half empty. Osman Dep., 22:1-23:11;
24 Exh. D to Plaintiff's Brief. The pillbox that Laird-Miller
25 carried with her, which was in her possession when she was
26 admitted to the hospital, contained six compartments: five

1 contained non-PPA medication and one was empty. Although Miller
2 does not remember seeing any specific pills in the box at the
3 time in question, he recalls seeing the "football-shaped"
4 Propagest in the pillbox at other times. Miller Dep., 42:10-
5 43:24; 75:15-76:5. Miller has further speculated that his wife
6 generally took the recommended dosage of her medications, though
7 he had no personal knowledge of the amount, if any, she took in
8 the days preceding her stroke. *Id.*, pp. 259-60. Miller does not
9 specifically recall his wife having any congestion problems that
10 day, but testified that Laird-Miller had a "continuous level" of
11 congestion for as long as he'd known her. *Id.*, pp. 146-47.

12 II. DISCUSSION

13 A. Summary Judgment Standard

14 Summary judgment is appropriate when "the pleadings, deposi-
15 tions, answers to interrogatories, and admissions on file,
16 together with the affidavits, if any, show that there is no
17 genuine issue as to any material fact and that the moving party
18 is entitled to judgment as a matter of law." Fed. R. Civ. P.
19 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The
20 moving party is entitled to judgment as a matter of law when the
21 nonmoving party has failed to make a sufficient showing on an
22 essential element of his case with respect to which he has the
23 burden of proof. *Celotex*, 477 U.S. at 323.

24 B. Whether Defendants Are Entitled To Summary Judgment In This 25 Matter

26 Defendants argue that plaintiff has submitted no evidence

1 that would establish that plaintiff's late wife ingested
2 Propagest (or any other PPA-containing medicine) within 72 hours
3 of her stroke, an essential element of his claim.


4 While plaintiff concedes that he has no direct evidence of
5 Propagest ingestion, he argues that he has nevertheless submitted
6 circumstantial evidence from which a reasonable jury could infer
7 that Laird-Miller ingested Propagest within 72 hours of her
8 stroke.¹ Plaintiff cites evidence that his wife had Propagest in
9 her possession at the time of her stroke, and had a habit of
10 ingesting PPA-containing and other medication to help her
11 breathe. He further submits that the evidence supports a finding
12 that sometime between the summer of 2000 and January 2001, Laird-
13 Miller ingested approximately 155 Propagest pills, increasing the
14 probability that she ingested the drug within the three days
15 before her stroke. He also notes that the empty compartment in
16

17 ¹ Plaintiff argues that under Montana law, he must be
18 allowed to put his circumstantial evidence before the jury. The
19 case plaintiff cites, *Brandenburger v. Toyota Motor Sales,*
20 *U.S.A., Inc.*, applied the theory of strict liability for the
21 first time in Montana products liability cases. 513 P.2d 268
22 (Mont. 1973). In *Brandenburger*, the Montana Supreme Court
23 reasoned that "[t]he nature and quality of evidence used in
24 products liability cases to show the defect and the nexus between
25 the defect and the accident naturally varies," and went on to
26 hold that circumstantial evidence could be considered probative
in cases in which a product was destroyed, and in which a
plaintiff was unable to testify. *Id.* at 268. By its own plain
language, however, the case applies only to evidence relating to
the alleged defect of a product and to that defect's nexus to the
plaintiff's injury. Plaintiff makes no case for extending the
holding of *Brandenburger* to include product identification or the
fact of a plaintiff's use of a product, at issue here.

1 the pill container could have held Propagest, as he had noticed
2 the football-shaped pills in the container in the past. Given
3 this evidence and the fact of Laird-Miller's stroke, plaintiff
4 argues, summary judgment is inappropriate.

5 The court acknowledges that plaintiff has presented no
6 direct evidence of timely ingestion, and that plaintiff may not
7 ultimately succeed in convincing a jury of his case. Taking as
8 true all of plaintiff's alleged facts, however, and drawing all
9 reasonable inferences therefrom, the court finds that a reason-
10 able jury could well conclude that Laird-Miller ingested the drug
11 in the three-day period preceding her stroke. Summary judgment is
12 therefore DENIED.

13 DATED at Seattle, Washington this 5th day of January, 2006.
14

15 
16 BARBARA JACOBS ROTHSTEIN
17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25
26